No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA SORONEN
Executive Director
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street NW, Suite 515
Washington, DC 20001

BRYAN K. WEIR
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
bryan@consovoymccarthy.com

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Attorneys for Amici Curiae

280597

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IDENTITY & INTEREST OF *AMICI CURIAE*[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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1. Pursuant to this Court's Rule 37.6, counsel for *Amici Curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus* briefs.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici have a substantial interest in the proper resolution of this case. State and local governments are better equipped to balance species preservation with the economic and social impact that can occur when such preservation requires restrictions on land use. Ensuring

that states and localities are consulted when the Fish and Wildlife Service makes exclusion decisions is therefore paramount. If the agency can avoid judicial review of such decisions, it will have no incentive to consult those who are experts in the land-use issues that exclusion decisions most affect. It thus is vitally important that the Fish and Wildlife Service not escape judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, the Fish and Wildlife Service (FWS) designated several tracts of land as a critical habitat for the dusky gopher frog. One of those tracts consists of 1,544 acres of commercial forest located in St. Tammany Parish, Louisiana. Because the dusky gopher frog has not lived on that land in over 50 years and cannot even survive there without a radical change in the land's features, Petitioner asked FWS to exclude it from the critical habitat designation. FWS refused. That decision may ultimately restrict all development on the land, imposing up to $34 million in losses to the private landowners.

Petitioner sought judicial review of that decision, as well as the underlying critical habitat designation. Despite the immense economic impact of FWS's action, the Fifth Circuit held that federal courts cannot review it because it is "discretionary." Among other things, Petitioner argues here that a decision not to exclude land from a critical habitat is subject to judicial review. *Amici* agree and write separately to explain that FWS cannot overcome the presumption that its actions are reviewable and to emphasize how exempting its decisions from review harms states and localities in particular.

This Court is skeptical when the Executive Branch argues that an agency's decisions are unreviewable in court. Judicial review of the President's and his subordinates' decisions has been a bedrock principle of our government since almost the Founding. Without it, the Court has explained, statutory limits on agency power are only paper guarantees.

Recognizing the importance of judicial review, the Court has required the federal government to overcome a "strong presumption" that agency decisions are subject to the scrutiny of federal courts. As a result, Congress must be clear in its statutes' language or structure that an agency's action is exempt from review. Absent either, the agency must defend its decisions in court just like any other defendant.

The Fifth Circuit failed to acknowledge (much less apply) this presumption when it held that FWS's decision not to exclude land from the dusky gopher frog's critical habitat was unreviewable. Had it done so, it would have discovered that no language in the Endangered Species Act (ESA) specifically exempted that decision from review. Nor would it not have found the necessary clarity in the ESA's structure.

The Fifth Circuit instead thought that FWS's decision not to exclude land from a critical habitat is unreviewable because "there are no manageable standards" for doing so. That position is strange, however, because the Fifth Circuit agrees there *are* standards for reviewing a decision *to exclude* land from a critical habitat, *i.e.*, the other side of the coin, because Section 1533(b)(2) tells the agency to decide whether "the benefits of exclusion

outweigh the benefits of designation." But Courts are capable of applying that same standard to decisions *not to exclude* just as well. The Fifth Circuit was wrong to conclude otherwise.

This narrow view of the federal courts' power to review FWS's decisions has harsh practical consequences. The regulation of land has always been within the bailiwick of states and localities. Land is inherently local and those who are closest to it are best equipped to address the unique issues surrounding its use. Localities have traditionally used that knowledge to encourage economic development and to manage population growth. They have also used it to preserve endangered or threatened species. And they have done so while mitigating the impact on the regional economy.

That same expertise is needed when FWS is making decisions about critical habitat designations. A single designation can cost local economies billions of dollars, especially if it is done haphazardly. Deciding what land to exclude from such a designation is therefore critically important. But FWS has little incentive to accommodate local expertise for its exclusion decisions if those decisions are not subject to judicial review. Without a safety net to catch its errant decisions, FWS can act without fear that its actions will be dissected and effectively ignore local concerns.

This case highlights the problem. Though Section 1533(b)(2) calls for FWS to balance "the benefits of exclusion" against "the benefits of designation," FWS refused to exclude the land despite the designation imposing up to $34 million in losses on the landowners

without any offsetting preservation benefit. Only the lack of judicial accountability can explain that result.

ARGUMENT

I. A Decision Not to Exclude Land from a Critical Habitat is Subject to Judicial Review.

The Court has always been skeptical when told the Executive Branch's actions are unreviewable. From the beginning, it has understood that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). And there is no place "in a government of laws and of principle" for an executive official to, "at his discretion, issue this powerful process ... leaving to the [citizen] no remedy, no appeal to the laws of his country; if he should believe the claim to be unjust." *United States v. Nourse*, 34 U.S. 8, 8-9 (1835). Otherwise, "statutory limits would be naught but empty words." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 n.3 (1986) (quoting B. Schwartz, Administrative Law § 8.1, p.436 (2d ed. 1984)).

Congress has also recognized the need for judicial review of agency actions. "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases." *Id.* at 671 (quoting H.R. Rep. No. 1980, at 41 (1946)). That is why "[i]t has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified." *Id.* (quoting S. Rep. No. 752, at 26

(1945)). Were it otherwise, Congress's "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Id.* at 671 (quoting S. Rep. No. 752, at 26 (1945)). For these reasons, "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

Against this backdrop, the Court has imposed on the federal government "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review" of an agency decision. *Bowen*, 476 U.S. at 673 (citation omitted). The Court's "cases have established that judicial review ... will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 670 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)); *see also Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (calling prohibitions on judicial review "a very narrow exception."). And that "persuasive reason" must come from Congress itself. The presumption thus can be overcome only if "a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining*, 135 S. Ct. at 1651; *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) (stating that the Court "will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence.").

The Fifth Circuit failed even to acknowledge this presumption, much less explain how FWS has rebutted it. Nor could it have. To that end, the first sentence of Section 1533(b)(2) requires FWS to designate a critical habitat "on the basis of the best scientific data available and after

taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The second sentence allows FWS to "exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. *Id.*

All agree that a critical habitat designation under the first sentence of Section 1533(b)(2) is subject to judicial review. *See* Pet. App. 15a-32a; Gov't C.A. Br. 22-36. All also agree that a decision to exclude land from a critical habitat under the second sentence is also subject to judicial review. Pet. App. 35a; Gov't C.A. Br. 40. It should follow, then, that a decision *not* to exclude land likewise is subject to judicial review. Nothing in the statute's language or structure suggests otherwise. There is no provision expressly exempting such decisions from judicial review. And there is nothing in the statute's structure that suggests an exemption. Quite the opposite. The Court has already recognized that the ESA's focus on "economic consequences" shows that one of its "objective[s] ... is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). The only way to check such zealous pursuit is through judicial review.

It is no surprise, then, that Fifth Circuit and the government have not relied on any statutory language for their contrary position. Instead, they rely almost entirely on the notion that "there are no manageable standards for reviewing the Service's decision not ... to exclude an area from a critical habitat." Pet. App. 34a; *see also* Gov't Br. in Opp. 29. But that is not true. The government agrees that Section 1533(b)(2) "provides a judicially manageable

standard to judge the agency's decision *to exclude* areas from critical designation." Gov't C.A. Br. 40. Namely, the statute permits FWS to exclude land if "the benefits of exclusion outweigh the benefits of designation." *Id.* But courts can scrutinize FWS's application of that balancing test whether it grants exclusion or not. *C.f.* Pet. App. 160a n.21 (Jones, J., dissenting from denial en banc) ("[T]he Service's decision ***not to exclude*** Unit 1 is really part and parcel of the decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as a critical habitat is judicially reviewable."). It is just two sides of the same coin.

If there were any doubt that FWS's exclusion decision here is reviewable, *Bennett* removes it. There, the Court disagreed with the government's position that a decision to designate a critical habitat was unreviewable. *Bennett*, 520 U.S. at 172. The government argued that the permissive language in Section 1533(b)(2)—that "[t]he Secretary *may* exclude any area from critical habitat"—meant FWS's decision regarding designation was unreviewable. *Id.* The Court responded that just because FWS had the "discretion" to designate a critical habitat did not mean its decision not to do so was unreviewable. *Id.* Rather, it meant that FWS's "ultimate decision" on whether land will fall within a critical designation was reviewable for an "abuse of discretion." *Id.*

Any reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), for the contrary conclusion is misplaced. In that case, prison inmates challenged the FDA's refusal "to take various investigatory and enforcement actions" against states using drugs for lethal-injection that had not been approved for that purpose. *Id.* at 824. *Heckler* recognized that "an agency's decision[s] not to prosecute or enforce" are "generally committed to an agency's *absolute*

discretion" and, for that reason, the presumption is flipped and judicial review is generally not available. *Id.* at 831 (emphasis added).

The unique nature of enforcement actions drove the Court's decision in *Heckler*. The Court noted there is little need for judicial review of enforcement decisions because when an agency declines to enforce the law "it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Such decisions are also unreviewable because they resemble a prosecutor's decision "not to indict" and that is "a decision which has long been regarded as the special province of the Executive Branch." *Id.* Like all such prosecutorial decisions, an agency must assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831.

Neither of those factors are at play under the ESA or this case. To start, FWS *has* exercised its coercive power by designating the property as a critical habitat. The decision not to exclude any of the property from the habitat may prohibit all development on the entire 1,544-acre tract—nearly 2.5 square miles—which would result in a $34 million loss to the owners. *See* Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118, 35,141 (June 12, 2012) ("Final Rule"). This exercise of federal power is undeniably coercive. And the decision whether to exclude the property from a critical habitat is far afield from the role of a prosecutor. It requires no

balancing of agency resources beyond the decision itself. *Heckler* is inapposite.

II. Insulating Exclusion Decisions from Judicial Review Allows the Agency to Ignore State and Local Land-Use Expertise.

Exempting exclusion decisions from judicial review has practical consequences as well. Federal agencies are generally required to consider outside expertise when issuing new regulations. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). FWS is no different. In this case, for example, FWS received comments addressing the designation's negative impact on St. Tammany Parish's economy and tax revenues, as well as on development in the areas surrounding the critical habitat. *See* Final Rule, 77 Fed. Reg. at 35,126-27. But without the prospect of judicial review, FWS had no incentive to seriously consider that expertise while addressing exclusion. Indeed, when decisions *to* exclude are subject to judicial review while decisions *not* to exclude are exempt, as the Fifth Circuit held, FWS is incentivized to choose the latter out of convenience. By doing so, it can avoid the work of defending its decision in court. This result unfortunately means that FWS can ignore those who are closest to the land-use issues most affected by critical habitat designations.

A. States and localities are well-positioned to preserve endangered species while balancing key local interests.

States and localities have had "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*,

531 U.S. 159, 174 (2001). In fact, the "regulation of land use is perhaps *the* quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). This is not a "historical accident." Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 Harv. J. on Legis. 289, 296 (2011). Land "by its nature ... is inherently local" because "[i]t exists within definite metes and bounds and cannot be moved." *Id.*

Because "local economic markets and environments differ," "they are not easily susceptible to generic statewide and national solutions." John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 Pace Envtl. L. Rev. 821, 853 (2006). For that reason, "[l]ocal and county governments are often the only levels of government that have the capacity to discover and act on the preferences of local constituencies." *Ostrow, supra*, at 296. They "are intimately familiar with local circumstances and have a great stake in economic success and protecting the quality of community life." *Nolon, supra*, at 853. As a result, they are well positioned to manage growth and to protect the welfare of their particular citizens. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (noting "with the great increase and concentration of population, problems have developed, and are constantly developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities").

St. Tammany Parish is no different. From 2000 to 2010, the parish's population grew 22%, increasing from 191,268 to 233,740 people. *See* Industrial Economics, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, 4-1 ¶ 71 (April 6, 2012), https://

perma.cc/NQT9-ZQD9. The parish accommodated that growth by opening a new high school, planning a major transportation infrastructure project, and allowing significant new private construction. *Id.* But because much of the new growth has surrounded the critical habitat at issue in this case, the parish's ability to manage its future population growth, which is expected to increase 100% by 2030, is in flux. *Id.*

Notably, states and localities like St. Tammany Parish do more than just accommodate population and economic growth. They also engage in environmental protection:

- In Florida, state and local efforts continue to defend local manatees even after FWS downgraded their federal protection from endangered to threatened. *See* Florida Fish and Wildlife Conservation Commission, Florida Manatee Program, https://perma.cc/8C3E-XMLQ. Not only do Florida's manatee protections date back to 1893, but the state manages an extensive protection program that is largely supported by individual donations and dedicated state funding. *Id.*

- In Maine, there are four ongoing state-level projects aimed at protecting the Blanding's and Spotted Turtles. *See* Maine Department of Inland Fisheries and Wildlife, Rare Turtles, https://perma.cc/SQ4T-AJL6.

- In Washington, "local efforts to conserve salmon have been ongoing since statehood." Christine O. Gregoire & Robert K. Costello, *The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 Wash. L. Rev. 697, 700 (1999).

State and local governments have also balanced conservation efforts with regional economic concerns. For example, FWS has listed the Utah prairie dog as a threatened species. *See People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 995 (10th Cir. 2017). Yet the prairie dog had already received extensive protection under state law. Before its designation, Utah generally prohibited the taking of a Utah prairie dog without permission; and it provided a layered enforcement approach depending in part upon the type of land at issue and the local population of prairie dogs. *See* Utah Admin. Code R657-70-5–70-12. Utah law also provided for capture and relocation of Utah prairie dogs interfering with developable land. *See* Utah Admin. Code R657-70-10(b)(ii). This resulted in state wildlife officials relocating more than 3,200 Utah prairie dogs from roughly two dozen sites to 11 new locations between 2009 and 2012, as well as repatriation to habitats from which the prairie dog left. *See* S. Nicole Frey, *Managing Utah Prairie Dog on Private Lands*, Utah State University Extension, at 4 (Feb. 2015), https://perma.cc/UA89-RG52.[2]

Efforts like these demonstrate that local communities are well-equipped to spearhead endangered species protections while also protecting local economic interests. At the very least, then, FWS should be receptive to state and local interests when deciding whether to exclude land from a critical habitat.

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2. Utah repealed these rules because they conflicted with the prairie dog's designation as a "threatened" species under the ESA. *See* Taking Utah Prairie Dogs, 2017 Utah Reg. Text 468,526 (Sept. 15, 2017).

B. FWS has little incentive to harness state and local expertise and account for ESA's massive costs if its decisions are unreviewable.

Local expertise is crucial when FWS is making decisions about critical habitat designations because those decisions can impose massive costs on states and localities. A recent survey of such designations for 159 species found that over 60 million acres has been designated critical habitat. *See* Brian Seasholes, *The Critical Nature of Critical Habitat Decisions*, Reason Foundation (June 1, 2016), https://perma.cc/8JFR-URK3. Those designations are set to impose an estimated $10 billion in costs over the next 20 years. *Id.* Just a few examples show how much a single designation can affect local economies and individuals:

- The proposed critical habitat designation for the northern spotted owl in Washington was estimated to impact—directly or indirectly—nearly 123,000 forestry related jobs and over $5 billion in wages every year. *See* Suzanne Hearn, *Northern Spotted Owns: The Cost of Critical Habitat Designation*, Forest2Market (Mar. 29, 2012), https://perma.cc/ER67-B737.

- FWS estimated that its critical habitat designation for the California red-legged frog would cost up to $500 million over two decades, affecting everything from residential and commercial development to agriculture and ranching. *See* Revised Designation of Critical Habitat for the California Red-Legged Frog, 75 Fed. Reg. 12,816, 12,858 (Mar. 17, 2010).

- FWS estimated its critical habitat designation for the green sturgeon would have annual impacts up to $74 million per year. *See* Final Rulemaking to Designate Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon, 74 Fed. Reg. 52,300, 52,301 (Oct. 9, 2009).

The direct economic losses in this case are similarly severe. FWS estimates the critical habitat designation for the dusky gopher frog could cause $34 million in lost opportunities to develop the land. *See* Final Rule, 77 Fed. Reg. at 35,141. And those losses do not include an estimated $17.1 million in untapped oil and gas reserves and $6.93 million in timber resources that the designation may prohibit. *See* Industrial Economics, *supra*, at ¶ 88.

Private parties are not the only ones who suffer these costs. "Considerable regulatory burdens and corresponding economic costs are borne by ... state and local governments ... as a result of critical habitat designation." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10678, 10680 (Aug. 2013). These designations can impede economic activity and lower property values, which can severely impact tax revenues. In 2012, for example, it was estimated that the proposed habitat designation for the northern spotted owl would result in the annual loss of $4.2 million in tax revenue. Hearn, *supra*. Those reduced revenues, in turn, strain crucial public services that localities provide. *See, e.g.*, Michael Newman, *Oregon School Districts' Fiscal Future Tied to Fate of Northern Spotted Owl*, Education Week (May 30, 1990), https://www.edweek.org/ew/articles/1990/05/30/09420034.h09.html

But unlike their state and local counterparts, FWS is not naturally attuned to these concerns. Federal agencies simply "know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 577 (1985) (Powell, J., dissenting). That is why Congress specifically instructed FWS to decide whether "the benefits of ... exclusion outweigh the benefits of specifying [an] area as part of the critical habitat." 16 U.S.C § 1533(b)(2).

Yet there is no way to guarantee that FWS will heed Congress's instruction if its exclusion decisions are unreviewable. Judicial review's "availability is a constant reminder to the administrator." Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 408 (1958). It "make[s] the agency's exercise of delegated authority more acceptable by ensuring that its discretion can be checked against standards set by Congress." John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 413 (2010). And, for that reason, it is the ultimate "guard against unauthorized or arbitrary governmental action." *Id.* But when an agency can "police its own conduct," *Mach Mining*, 135 S. Ct. at 1651, the regulated are "left to the absolutely uncontrolled and arbitrary action of a public and administrative officer." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

This case demonstrates the principle. Congress intended FWS to use caution when exercising its power to designate critical habitats. *See* H.R. Rep. No. 95-632, at 18 (1978) ("[T]he Secretary should be exceedingly

circumspect in the designation of critical habitat outside of the presently occupied area of the species."). And Congress amended the ESA specifically to "increase the flexibility in balancing species protection and conservation with development projects." H. Rep. No. 97-567, at 10 (1982). Despite that, FWS imposed $34 million in losses with no corresponding benefit, as the dusky gopher frog cannot live on the designated 1,544 acres in St. Tammany Parish. The FWS then refused to exclude any part of that property from the designation. Exempting that decision from judicial review only encourages more of this kind of "needless economic dislocation," *Bennett*, 520 U.S. at 176, because there is no pressure on agency officials to abide Congress's directives. And, in the process, FWS can ignore the expertise that states and localities provide in this arena.

Indeed, the need for accountability is acute here because there is reason to believe that FWS's efforts at preserving species are largely ineffective: only 80 species have been removed from the threatened and endangered list, which now includes more than 2,250 animal and plant species. And more than a third of those removed were due to extinction or data errors, as opposed to successful recovery.[3] Judicial review of the FWS's costly actions is therefore crucially important to prevent arbitrary and unnecessary decisions.

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3. *See* FWS delisting report, https://perma.cc/FJ22-XUU5.

CONCLUSION

For all these reasons, this Court should reverse the Fifth Circuit's decision.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street NW,
Suite 515
Washington, DC 20001

BRYAN K. WEIR
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
bryan@consovoymccarthy.com

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Attorneys for Amici Curiae